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July 2, 2001

EX PARTE OR LATE FILED

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
Office of the Secretary
445 Twelfth Street, S.W. Room TWB-204
Washington, DC 20554

Re: Ex Parte Presentation in CC Docket Nos. 96-98 and 98-147

Dear Ms. Salas:

On Friday, June 29, 2001, Jonathan Lee, Robert Aamoth and I, on behalf of the Competitive Telecommunications Association ("CompTel"), met with Kimberly Cook and Brent Olson of the Common Carrier Bureau and Linda Kinney, Sonja Rifken, John Rogovin, Paula Silberthau and Debra Weiner of the Office of General Counsel regarding the above-referenced proceeding. During the meeting, CompTel explained why the Commission should interpret the term "necessary" in section 251(c)(6) so that CLECs can collocate equipment that maximizes "collocation" throughput," as discussed in more detail in the attached comments. CompTel also discussed similarities between its position on collocation and Qwest's position on access to ILECs' Central Offices as outlined in the attached comments that Qwest filed in CC Docket No. 01-77 on April 23, 2001.

In accordance with Section 1.1206 of the Commission's rules, an original and one copy are being filed with your office.

Sincerely,

Todd D. Daubert

Attachments

cc: Kimberly Cook
Linda Kinney
Brent Olson
Sonja Rifken
John Rogovin
Paula Silberthau
Debra Weiner

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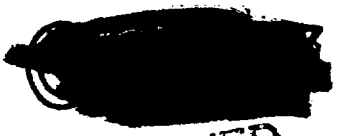

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	**CC Docket No. 98-147**
	)	
and	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	**CC Docket No. 96-98**

SEPARATE COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

These separate comments give CompTel's perspective on two sets of issues in this proceeding. *First*, CompTel urges the Commission to consider the "collocation throughput" standard when interpreting the phrase "necessary for interconnection or access to unbundled network elements" in Section 251(c)(6). This standard recognizes that the relationship between permitted collocation practices and the amount of traffic a CLEC can route through its collocation arrangement is not static. That relationship is dynamic, and CompTel has identified two specific practices – the collocation of multi-function equipment, and CLEC-to-CLEC cross-connections – which, if adopted, would enable CLECs to maximize their collocation throughput. These practices are "necessary" (in any sense of that term) for interconnection of the incremental portion of a CLEC's traffic stream that these practices make possible.

The collocation throughput standard is consistent with Congress' desire to promote local competition because there is a direct correlation between collocation throughput and local competition. A market environment characterized by low collocation throughput reflects the absence of local competition, whereas a market characterized by robust collocation throughput reflects more vibrant local competition. Therefore, construing Section 251(c)(6) so that CLECs can maximize their collocation throughput would promote Congress' objectives.

In order to apply the collocation throughput standard to a specific collocation practice, the Commission should focus on whether it is materially more efficient for a CLEC to engage in that practice within the collocation arrangement. While efficiency considerations in a vacuum cannot justify collocation, such considerations can justify a taking when they show that collocation is "necessary for interconnection" for a material portion of the CLEC's traffic stream. The Commission should create a rebuttable presumption in favor of collocation for practices

desired by the CLEC market segment. CLECs are non-dominant carriers who will voluntarily choose to rely upon an ILEC-provided resource only when they have no other feasible options for accomplishing the same objective without suffering market harm.

The collocation throughput standard is consistent with the judicial admonition against overbroad standards. For example, the collocation of payroll or data collection functionalities would not meet the collocation throughput standard and would not be "necessary" for interconnection or access to network elements. Further, this standard will minimize the taking imposed on ILECs through collocation. By maximizing the efficient use of scarce collocation resources, both rules – the collocation of multi-function equipment, and CLEC-to-CLEC cross-connections – will result in the most efficient taking of property for collocation.

Second, the Commission should adopt rules designed to ensure that NGDLC systems do not discriminate against particular carriers or classes of carriers. The Commission should adopt a rule requiring ILECs to implement NGDLC systems in a manner that promotes cost-based access by multiple carriers to the maximum feasible extent. In addition, the Commission should do the following: (i) adopt a disclosure-and-comment process before ILECs may deploy NGDLC systems; (ii) require ILECs to use cross-connect panels rather than splice points wherever it is technically feasible; (iii) establish electronic OSS capabilities for multiple carriers to use remote feature servers to access all NGDLC features and functionalities; (iv) prohibit ILECs from using NGDLC systems in ways that CLECs cannot; and (v) prevent ILECs from retiring copper loops until CLECs an provide all services from remote terminals that they now can provide from collocation arrangements in central offices. The Commission also should adopt rules to ensure that NGDLC systems do not interfere with the ability of CLECs to provide services from collocation arrangements in ILEC central offices.

Before the
Federal Communications Commission
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In the Matters of	)	
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	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98

SEPARATE COMMENTS OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these separate comments in response to the *Second Notice of Proposed Rulemaking* (FCC 00-297) [hereinafter "*Second Notice*"] released by the Commission in this proceeding on August 10, 2000. CompTel is participating in joint comments being submitted today by a number of competitive local exchange carriers ("CLECs") and their industry associations. CompTel is filing these separate comments to present its own perspective on several issues raised in the *Second Notice*.

I. THE COMMISSION SHOULD INTERPRET THE TERM "NECESSARY" IN SECTION 251(C)(6) SO THAT CLECS CAN COLLOCATE EQUIPMENT THAT MAXIMIZES COLLOCATION THROUGHPUT.

Section 251(c)(6) of the Communications Act of 1934, as amended (the "Act"), requires incumbent local exchange carriers ("ILECs") to enable CLECs to collocate equipment "necessary for interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6). The U.S. Court of Appeals vacated and remanded the Commission's construction of that provision. *GTE Service Corporation v. FCC*, 205 F.3d 416, 422-24 (D.C. Cir. 2000)

[hereinafter "*GTE*"]. The Commission has now asked parties to comment on the interpretation it should adopt of the phrase "necessary for interconnection or access to unbundled network elements" in Section 251(c)(6).

A. The Meaning of the Term "Necessary"

In construing Section 251(c)(6), the Commission must take into account the relevant statutory context and the underlying Congressional objectives.[1] Congress adopted Section 251(c)(6) in particular – and Section 251(c) in general – to promote local exchange and exchange access competition. Congress recognized that competition would flourish only if CLECs have the right to interconnect with ILECs, and to do so through the use of equipment that is collocated at the ILECs' premises. Simply put, Congress mandated interconnection so that CLECs can hand-off to, and receive traffic from, the ILECs. In construing Section 251(c)(6), the Commission must recognize the correlation between the amount of traffic exchanged between CLECs and ILECs through collocation arrangements – what CompTel calls "collocation throughput" in these comments[2] – and Congress' objective of vibrant local competition. A market environment characterized by low collocation throughput reflects the absence of local competition, whereas a market environment characterized by robust collocation throughput reflects more vibrant local competition.

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1 *See, e.g., National Railroad Passenger Corp. v. Boston Maine Corporation*, 503 U.S. 407 (1992) (examining the context of the term and the purpose of the statute as a whole to determine the interpretation of the word "required"); *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991) (stating that words cannot be taken out of context and that the entire statute must be examined).

2 CompTel uses the term "collocation throughput" to refer to the amount of traffic that an individual CLEC routes through its collocation arrangement (or that all CLECs route in the aggregate through their collocation arrangements at a particular central office), not the amount of traffic which any particular equipment is designed to handle.

In analyzing what collocation practices are "necessary for interconnection" within the meaning of Section 251(c)(6), the Commission should take into account the relationship between those practices and a CLEC's collocation throughput. If a particular collocation practice enables a CLEC to increase its collocation throughput, then that practice is "necessary for interconnection" for the CLEC's incremental collocation throughput that is directly attributable to the practice in question.

A simple example demonstrates the relevance of collocation throughput to the statutory inquiry. Suppose a CLEC collocates a piece of equipment whose sole function is to exchange traffic with the ILEC, and the CLEC exchanges 100,000 minutes per month through its collocation arrangement. Suppose that the CLEC now adds a functionality to the collocated equipment (*e.g.*, switching, or data-voice splitting), and that this added functionality enables the CLEC to now route 500,000 minutes per month through its collocation arrangement. In that example, the ability to collocate the multi-function equipment clearly is "necessary for interconnection" (in any sense of that phrase) for at least 400,000 minutes of traffic.[3] While ILECs and CLECs can debate whether collocating the multi-function equipment is "necessary for interconnection" for 100% of the CLEC's traffic,[4] there can be no debate that collocation of the multi-function equipment is "necessary for interconnection" for the incremental traffic that

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[3] Throughout these comments, and solely for convenience, CompTel shall refer to the statutory phrase "necessary for interconnection" as a shorthand for the full statutory phrase "necessary for interconnection or access to unbundled network elements." By focusing on interconnection, CompTel does not mean to suggest that collocation is not equally necessary for access to unbundled network elements.

[4] As stated in the CLEC coalition comments, CompTel fully agrees that collocation of multi-function equipment (and CLEC-to-CLEC cross-connections) are "necessary for interconnection" for 100% of a CLEC's traffic. *See Joint Comments* at Sections III.C., V.A.I. CompTel submits that the analyses contained in these comments and in the *Joint Comments* are reasonable, alternative justifications for adopting the rules proposed herein.

would not exist but for the use of that equipment. As a result, CLECs should be entitled to collocate such equipment under Section 251(c)(6).

It is no answer for the ILECs to suggest that the CLEC in this example could locate the additional functionality outside the collocation arrangement. For many CLECs, establishing one or more separate network points for switching, voice/data splitting, or other functionalities is far more costly than collocating multi-function equipment. The costs of establishing separate nodes would force the CLEC to ramp up services more slowly, limit geographic coverage, or raise retail rates, thereby reducing collocation throughput and weakening local competition. In some cases, the CLEC could be forced to abandon or severely limit its use of additional functionalities because it does not have access to sufficient capital to establish separate network nodes outside its collocation arrangements. As a result, the CLEC in the example above would have generated significantly less than 500,000 minutes per month if forced to incur the enormous costs of establishing separate nodes. Hence, a CLEC's (theoretical) ability to establish a particular functionality outside its collocation arrangements does not remove the necessity of collocating multi-function equipment to ensure interconnection for 100% of the traffic that the CLEC is capable of generating from the equipment.

With respect to any particular collocation practice, the Commission should focus on whether it is materially more efficient for a CLEC to engage in that practice within the collocation arrangement, or whether the CLEC suffers no material efficiency losses if it must engage in that practice elsewhere in the network. While efficiency considerations in a vacuum cannot justify a taking, such considerations can justify a taking when they show that collocation is "necessary" for a CLEC to interconnect with the ILEC for all the traffic it is capable of generating. In cases where collocation is materially more efficient, the CLEC's collocation

throughput will be maximized if it can implement that practice within the collocation arrangement and, hence, the practice is "necessary for interconnection" for the CLEC's traffic.

It bears emphasis that whenever a collocation practice offers a material efficiency gain to a CLEC, that practice also represents the most efficient way of allocating space in ILEC facilities among multiple CLECs, thereby minimizing the taking necessary to fulfill the statutory directive and promote Congress' purposes. As discussed below, interpreting Section 251(c)(6) narrowly to preclude these collocation practices not only would subvert competition by forcing CLECs to engage in inefficient practices, it could result in the inefficient (*i.e.*, excessive) taking of the ILEC property.

The question arises as to how the Commission can know when it is materially more efficient for a requesting carrier to implement a practice in a collocation arrangement. CompTel submits that the Commission reasonably may establish a rebuttable presumption in favor of collocation based on marketplace forces. As the Commission has recognized before, CLECs are non-dominant carriers[5] that have strong incentives to minimize their dependence upon the ILECs. Whenever faced with the realistic option of using their own facilities (or a non-ILEC's facilities) without suffering a significant competitive handicap, CLECs will select that option every time to eliminate their reliance on arrangements that ILECs are providing against their will. Therefore, if non-dominant carriers desire to implement a particular collocation practice, it is only because the carriers have no other feasible option for accomplishing the same objective without suffering in the marketplace. Particularly given the overwhelming record evidence in this docket that the ILECs have thrown one obstacle after another in the way of

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5 *See Local Competition Order*, 11 FCC Rcd, 15499, 15981, para. 979 (1996) (stating that non-incumbent LECs definitionally lack the market power possessed by incumbent LECs).

CLECs seeking to compete through collocation arrangements,[6] no further record evidence is needed for the Commission to establish a rebuttable presumption that the natural incentives of CLECs will ensure that they engage only in those collocation practices that satisfy the "necessary for interconnection" standard.[7]

Based on this presumption and the record evidence, the Commission should at this time adopt rules enabling CLECs to engage in two specific practices that are "necessary for interconnection." *First*, the Commission should require ILECs to enable any non-dominant requesting carrier to collocate multi-function equipment within that carrier's collocation arrangement. Based on the record evidence and the Commission's experience in this area, there is no dispute that the CLEC industry segment strongly desires to engage in this practice, and that it is materially more efficient for CLECs to collocate multi-function equipment than to construct separate network nodes for additional functionalities.[8] CompTel understands that CLECs can achieve a much lower cost per access line when they collocate a functionality as compared to establishing that functionality outside the collocation arrangement. Indeed, the ILECs place the same multi-function equipment in their central offices for their own uses, thereby affirming the efficiency gains that can be achieved by CLECs from collocating this equipment. Because CLECs can maximize collocation throughput by collocating multi-function equipment, this practice satisfies the "necessary for interconnection" language in Section 251(c)(6).

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6 *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761, 4783 (1999) (stating that the record is replete with evidence of provisioning delays) ("*Collocation Order*"); *see also Local Competition Order*, 11 FCC Rcd at para. 10 (stating that ILECs have few incentives to assist new entrants obtain a greater share of the market).

7 *See Allentown Mack Sales and Service, Inc. v. National Labor Relations Board*, 118 U.S. 818, 828 (1998) (agency has substantial discretion to adopt evidentiary presumptions).

Second, the Commission should require ILECs to enable non-dominant carriers to engage in CLEC-to-CLEC cross-connections within the central office under Section 251(c)(6). As with multi-function equipment, the record evidence and the Commission's experience demonstrate that CLECs as an industry segment desire to engage in this practice, and that it is materially more efficient to engage in this practice within the central office than elsewhere in the network.[9] Permitting a CLEC to implement such cross-connections within the central office at cost-based rates will maximize its collocation throughput while minimizing the "taking" of ILEC property by collocating CLECs. Certainly, the collocation throughput of all CLECs collocated in a particular central office will be maximized – and the aggregate "taking" of ILEC property minimized – if the CLECs are permitted to share resources efficiently through cross-connections. As a result, CLEC-to-CLEC cross-connections satisfy the "necessary for interconnection" language in Section 251(c)(6).

B. The GTE Decision

The collocation throughput standard for interpreting the statutory term "necessary" is fully consistent with the recent *GTE* decision. The Court there was concerned that the FCC's "used or useful" standard was "impermissibly broad" because it did not appear to incorporate "some limiting standard." *GTE* at 423. The Court specifically noted that the "used or useful" standard might be applied to justify collocating payroll or data collection features, which, in its view, would "'diverge[] from any realistic meaning of the statute.'"[10] The Court

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(...continued)

8 *See Collocation Order*, 14 FCC Rcd at 4778, para. 31 (denying competitive carriers the ability to collocate multi-function equipment would be a competitive disadvantage for CLECs).

9 *See id.* at 4779, para. 33; *see also* Joint *Comments* at Section V.B.

10 *Id.* at 424 (*quoting Massachusetts v. Department of Transportation*, 93 F.3d 890, 893 (D.C. Cir. 1996)).

acknowledged that the "used or useful" standard might permit CLECs to lower their costs and provide more services, but rejected the standard because the Commission did not adequately tie those goals to the statutory language and structure.[11] Similarly, the Court expressed concern that the Commission's "used or useful" rule would result in a greater taking of ILEC property than is necessary to implement Section 251(c)(6). On remand, the Commission is charged with developing an interpretation of this provision that reflects "'the ordinary and fair meaning of [the statute's] terms."[12] The Commission is not precluded from re-adopting its previous rule if it provides a "better explanation" as to why that rule makes sense in light of the statutory language and structure.[13]

The collocation throughput standard reflects the type of "limiting standard" the Court found lacking in the Commission's previous rules. The example used by the Court itself is illustrative. Collocating payroll or data collection functionalities would not materially increase a CLEC's collocation throughput, and hence such functionalities need not be included in collocated equipment under this standard. In fact, CompTel is not aware of any requesting carrier which has sought to collocate such functionalities within an ILEC's central offices, thereby affirming that equipment with such functionalities is not "necessary for interconnection." CLECs suffer no loss of efficiency when they perform such functionalities outside of collocation arrangements, and therefore they prefer self-provisioning or other outsourcing to dependence upon an ILEC-controlled resource. The collocation throughput standard is not impermissibly broad because it does not justify the collocation of any and all equipment which conceivably might be utilized by an individual CLEC.

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11 *Id.*

12 *Id.* (*quoting AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 390 (1999)).